

Matter of Lovette v Boli
2014 NY Slip Op 30791(U)
April 1, 2014
Sup Ct, Albany County
Docket Number: 5436-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
MARTIN LOVETTE, # 11-R-3612,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION and ORDER
RJI NO.: 01-13-ST5182
INDEX NO.: 5436-13

MAUREEN E. BOLL, DEPUTY COMMISSIONER,
NYS DEPARTMENT OF CORRECTIONS AND
COMM. SUP.,

Respondent.

Supreme Court Albany County All Purpose Term, February 7, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Petitioner, Pro Se
11-R-3612
Watertown Correctional Facility
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TERESI, J.:

Petitioner challenges Respondent's denial of his Freedom of Information Law (FOIL) request for the report relating to the determination not to permit Petitioner to visit his dying mother.

The Court begins by rejecting Respondent's argument that this Article 78 proceeding is barred by the four-month statute of limitations (CPLR § 217) because the time to commence the proceeding automatically commenced running at the point that Respondent failed to issue a determination on Petitioner's administrative appeal within the time period statutorily prescribed by Public Officers Law § 87(4). Pursuant to CPLR § 217(1), "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the Petitioner," which, in turn, occurs when the challenged "determination" becomes "final and binding" (Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007]; Owners Comm. of Elec. Rates, Inc. v Pub. Serv. Com'n of State of N.Y., 76 NY2d 779, 780 [1990], revg. on dissenting op. of Levine, J., 150 AD2d 45 [3d Dept 1989]; Town of Olive v City of New York, 63 AD3d 1416, 1418 [3d Dept 2009]; Riverkeeper, Inc. v Crotty, 28 AD3d 957 [3d Dept 2006]). When determining whether an agency action is a "final determination" courts must consider the completeness of the administrative action and make a pragmatic evaluation as to whether a position has been reached that inflicts an actual, concrete injury. Consideration must also be accorded to whether further administrative action or further resort to administrative remedies by the complaining party might serve to ameliorate the injury (Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007]; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1046 [3d Dept 2012]).

Respondent does not claim to have notified Petitioner that Respondent would not issue a decision in response to his administrative appeal or that if it issued any determination, it would only issue the determination within the statutory time frame. Thus, Petitioner had no way of knowing that Respondent would not issue a final determination. Respondent did not and could

not render a “final” determination for statute of limitations purposes by merely failing to render a determination within the required time. Respondent’s failure to render a timely determination was sufficient to exhaust Petitioner’s administrative remedies and allow Petitioner to proceed with this special proceeding, but Respondent’s failure to render a timely determination could not by itself establish that a final determination would not belatedly issue.

Turning to the merits of the petition, the Court notes that FOIL, which is codified in Public Officers Law at Article 6, was enacted to foster the public’s “inherent right to know” the workings of government by shedding light on government decision making (Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 416 [1995]; Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]). The act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse (see, Public Officers Law § 84; Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 416 [1995]; Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]; Matter of Tartan Oil Corp. v State of New York Dept., of Taxation & Fin., 239 AD2d 36, 38 [3d Dept 1998]). Judicious use of the provisions of the law can be a remarkably effective device in holding the governors accountable to the governed (Matter of Fink v Lefkowitz, 47 NY2d 567, 571 [1979]).

Under FOIL, records in the possession of a public agency are presumed to be available for public inspection and copying unless they fall within one of the specific exceptions established in Public Officers Law § 87(2) (Matter of Markowitz v Serio, 11 NY3d 43, 50-51 [2008]; Matter of Gould v New York City Police Department, 89 NY2d 267, 274 [1996]; Matter

of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of NY at Farmingdale, 87 NY2d 410, 417-418 [1995]; Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]; Matter of Troy Sand and Gravel Co. Inc. v New York State Dept., of Transp., 277 AD2d 782, 784 [3d Dept 2000]) or another statute establishes a clear legislative intent to establish and preserve confidentiality of the records (Matter of Capital Newspapers Div. v Burns, 67 NY2d 562, 567 [1986]; Matter of M. Farbman v New York City Health & Hosps. Corp., 62 NY2d 75, 81 [1984]; Matter of Collins v New York State Div. of Parole, 251 AD2d 738, 738 [3d Dept 1998]; Matter of Wm. J. Kline & Sons Inc. v County of Hamilton, 235 AD2d 44, 46 [3d Dept 1997]).

In the Article 78 proceeding, the agency must demonstrate that the withheld material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access (Matter of Markowitz v Serio, 11 NY3d 43, 50-51 [2008]; Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462-463 [2007]). Agencies may meet their burden of doing so by submitting the documents in question for in camera inspection (Matter of Bass Pro, Inc v Megna, 69 AD3d 1040, 1041 [3d Dept 2010]; Matter of Miller v New York State Dept., of Transp., 58 AD3d 981, 982 [3d Dept 2009]).

Respondent urges that the document in question was properly withheld from release pursuant to FOIL because release of the document would be an unwarranted invasion of personal privacy and/or could endanger the life or safety of a person (Public Officers Law §§ 87[2][b] and [f]). Respondent has submitted the document in question for in camera inspection. After examining the document, which reveals the health issues and family dynamics underlying the process by which the application for a death-bed visit was considered, the Court concludes that the document clearly falls within the exception for personal privacy.

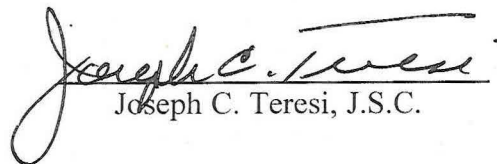
Accordingly, it is hereby

ORDERED, that petition is denied and the relief requested in this proceeding is in all respects denied.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
April / , 2014


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated October 21, 2013; Petition dated September 26, 2013, with attached exhibits.
2. Answer dated January 31, 2014; Affirmation of Stephen M. Kerwin, AAG dated January 31, 2014, with attached exhibits A-I.